



July 12, 2000

Ms. Ruth H. Soucy
Deputy General Counsel
Open Government
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2000-1734A

Dear Ms. Soucy:

This office received a request to examine Open Records Letter No. 2000-1734 (2000), because this office failed to consider information submitted by a third party. The request was assigned ID# 136986.

The Comptroller of Public Accounts (the "comptroller") received a number of requests in which the responsive information consists of one or more proposals submitted to the comptroller by eight third parties, specifically LTD Financial Services, L.P., Southwest Credit Systems, Inc., Collections Express Services, Inc., Risk Management Alternatives, Inc., OSI Collection Services, Inc., Account Services Collections, Inc., Honor Creditors Agency, Inc., and SARMA. You provided for our review the responsive information, and stated this information *may* be excepted from disclosure under section 552.110 of the Government Code. You made no specific arguments in support of the section 552.110 assertion. *See* Gov't Code § 552.305(a). However, you also notified the third parties of the requests by a letter dated March 2, 2000 in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

In Open Records Letter No. 2000-1734 (2000), this office determined that a portion of the information contained in the proposal of Southwest Credit Systems, Inc. ("Southwest") was excepted from disclosure under section 552.110. The decision further stated:

The other seven third parties did not respond to the notice. We therefore have no basis to conclude that any of the remaining responsive information is excepted from required public disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or

evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The remaining information must, therefore, be released.

We have since learned that in addition to the response from Southwest, this office timely received a response from Collection Express Services, Inc. ("CESI") through their legal counsel, Griffin & Matthews, and that we failed to consider the CESI response in Open Records Letter No. 2000-1734 (2000).¹ See Gov't Code § 552.305(d)(2)(B). Where this office determines that a factual error is made and that error resulted in an incorrect decision, we will correct the previously issued ruling. The CESI response argues that its information is excepted from disclosure by sections 552.104, 552.110, and 552.128 of the Government Code.²

Based on the arguments submitted by CESI and careful review of the information at issue, we believe that CESI has demonstrated through specific factual evidence that their proposal, if publicly released, would cause substantial competitive harm to CESI. See Gov't Code § 552.110(b). We therefore determine that you must not release CESI's proposal. Because section 552.110 is dispositive, we do not address the section 552.128 assertion. Open Records Letter No. 2000-1734 (2000) is overruled to the extent that it conflicts with this decision.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within

¹Upon receipt of his copy of the decision, Mr. Neal Spielman with Griffin & Matthews contacted our office and advised that, in response to your notice, he had timely submitted a brief to this office on behalf of his client, CESI. Mr. Spielman later provided evidence demonstrating that this office received, on March 13, 2000, the brief that he had prepared. Upon Mr. Spielman's initial assertion, this office contacted you and you indicated that the proposal of CESI had not yet been publicly released. We accordingly advised that you must not release the CESI proposal pending our re-examination of Open Records Letter No. 2000-1734 (2000).

²We note that section 552.104 of the Government Code serves as an exception to disclosure to protect the interests of governmental bodies and not third parties. See Open Records Decision No. 592 at 8-9 (1991). We have nevertheless considered CESI's 552.104 arguments with reference to the section 552.110 assertion. As to the section 552.128 assertion, CESI references section 552.127 of the Government Code, but in the context of an argument pertaining to the information of a "historically underutilized or disadvantaged business." See Gov't Code § 552.128. Thus, we understand the reference to section 552.127 to actually be an assertion of section 552.128.


30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


Rebecca L. Payne
Assistant Attorney General
Chief, Open Records Division

RLP/MG/pr

Ref: ID# 136986

Encl. Submitted documents

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